IN THE HIGH COURT OF DELHI

CRL.M.C.No.1709/2001

Vinay Mohan Sharma ..... Petitioner
! through: Petitioner in person.

VERSUS

$ Delhi Administration ..... Respondent
^ through: Mr. Jaideep Malik, Adv.
for the State.

RESERVED ON : 1.11.2007

% DATE OF DECISION: 5.11.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Petitioner is the editor, printer and publisher of a magazine titled “Eternica”. The magazine was found to be publishing obscene and indecent photographs of women. The petitioner was sought to be prosecuted for having committed an offence under Section 292 IPC as also Section 4 and Section 6 of the Indecent Representation of Women (Prohibition) Act 1986.

2. Vide order dated 25.9.2000, learned ACMM

recorded a prima facie view that offences as aforenoted were made out holding that the magazine contains photographs depicting naked and semi-naked woman in an obscene manner and that prima facie the magazine had a depraving effect. Notice under Section 251 Cr.P.C. was framed.

3. Petitioner pleaded not guilty and immediately proceeded to file a revision petition before the learned Sessions Judge praying that the notice framing the charge be quashed. Vide order dated 7.2.2001, learned ASJ. dismissed the revision petition inter alia opining as under:-

> "Section 292 categorizes obscenity for the purposes of the section under the following three heads:
>
> (a) Lasciviousness
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> (b) appealing to the prurient interest, and
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> (c) tending to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. Dealing with the question as to what is "obscene" the Constitution Bench of the Supreme Court in the case of Ranjit Udesh Vs. State of Maharashtra AIR 1965 SC page 881 quoted with approval a passage of Cockburn, [.]. in Hicklin's case which laid down the test of obscenity in these words:
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> > ".... I think the test of obscenity is this whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to

> such immoral influences, and into whose hands a publication of this sort may fall.... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts or a most impure and libidinous character."

Relying upon cases of Sree Ram Saksena Vs. Emperor 1940 (1) Calcutta, page 581 and Sada Nand & Ors. Vs. State (Delhi Administration) Crl. Rev. Petitions No. 16 to 17/80 decided by our own High Court on 20.3.1986. It is submitted that a picture of a woman in the nude is not per se obscene. For the purpose of deciding whether the picture is obscene or not, one has to consider to a great extent the surrounding circumstances, the pose, the posture, the suggestive element in the picture, the persons in whose hands it is likely to fall, etc. Keeping these aspects in mind, it cannot be said in the present case that the Ld. Addl. Chief Metropolitan Magistrate should not have issued notice to the petitioner under Section 251 Cr.P.C. in respect of offence under Section 292 IPC as well as 4/6 I.R.W.Act. The Ld. Addl. Chief Metropolitan Magistrate has taken the view that the magazine is full of nude and semi-nude pictures of women almost on every page without any reference of context and the likely effects of the contents of the magazine on the readers is explicit and it has an effect of depraving the minds of its readers. Reference at this stage may be made to I.R.W.Act which was enacted to prohibit indecent representation of women inter alia in publication, writing figures or in any other manner. Section 2 (c) of I.R.W.Act defines and means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals. The human body whether male or female cannot be regarded obscene per se without something more. That something more is to be found in the facial expression or pose in which it is photographed.

> Considering the facial expression and the pose of the nude, semi-nude women in this magazine of the petitioner it is clear prima facie that there is indecent representation of woman."

4. The petitioner has approached this court under Section 482 Cr.P.C. praying that the order dated 25.9.2000 passed by the learned ACMM and the order dated 7.2.2001 passed by the learned ASJ be quashed.

5. Petitioner who appeared in person and is a lawyer by profession urged at the hearing that the magazine in question was not meant for the common man but was meant for broadminded people belonging to the elite class and therefore the photographs/pictures published in the magazine would neither deprave nor affect the minds of the persons who would purchase and read the magazine. Petitioner urged that merely because the magazine dealt with issues regarding to sex and that pictures of semi-nude women were published cannot make the magazine obscene without something more.

6. Before discussing the law on the subject, it would be relevant to note that the cover of the magazine has in the backdrop a close up photograph of a woman where the bosom is prominently displayed. A low cut blouse has been worn by the woman. More than half of the breast and especially the cleft between the two breasts is displayed. Further, on the cover page the

following words are printed:-

"Sex Sells
But does it pay?"

7. On the third page is the photograph of a nude woman in a reclining posture with her breast prominently thrusted forward. At the center spread is a pull out of a woman wearing a see through gown. The focus of the photograph is once again on the bosom of the woman. The nipples and the breast are prominently displayed. The cleft is prominently shown. 1/3rd of the breast is not even covered with the see-through dress worn by the woman. Underneath the see-through dress worn by the woman, complete contours of the breast are visible. On the reverse of the said photograph is the photograph of two women where once again the breast of two is prominently displayed. A similar photograph is to be seen at page 25 of the magazine. After page 40 of the magazine, without any page number being assigned, on 14 consecutive pages, photographs of women all scantly dresses in various poses are printed. In some photographs the see-through material worn by the woman is so transparent that the breast of the women depicted in the photograph is clearly visible to the naked eye.

8. Articles published in the magazine are under

the caption "C*oncept of virginity"*; "H*appy in bed"* etc.

9. Section 292 IPC reads as under:-

> **"292. Sale, etc., of obscene books, etc.-[**(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.]
>
> [(2)] Whoever-
>
> (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation, or figure or any other obscene object whatsoever, or
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> (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
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> (c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
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> (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene

object can be procured from or through any person,

(e) offers or attempts to do any act which is an offence under this section, shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend o five thousand rupees].

[*Exception.***-** This section does not extend to-

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure-

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern,

(ii) which is kept or used *bona fide* for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in-

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 if 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]]"

10. Section 4 of the Indecent Representation of the Women (Prohibition) Act 1986 reads as under:-

"**4. Prohibition of publication or sending by post of books, pamphlets, etc., containing indecent representation of women** – No person shall produce or cause to be

produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form:

Provided that nothing in this section shall apply to -

(a) any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation of figure -

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure is in the interest of science, literature, art, or learning or other objects of general concern; or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in -

(i) any ancient monument within the meaning of the Ancient Monument and Archaeological Sites and Remains Act, 1958 (24 of 1958); or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

(c) any film in respect of which the provisions of Part II of the Cinematograph Act, 1952 (37 of 1952(, will be applicable."

11. It is true that a picture of a woman in nude/semi-nude is not per-se obscene unless there is something in it which would offend the taste of a ordinary decent minded person.

12. Unless the picture of a nude/semi-nude female is an incentive to sensuality or impure or excite the thoughts in the mind of an ordinary persons of normal temperament, the pictures cannot be regarded as obscene within the meaning of Section 292 IPC.

13. No doubt, no hard or fast rule cannot be laid down for determination of the issue whether the picture is obscene or not but broadly speaking focus has to be on viewing the picture in the context of the surrounding circumstances, the pose, the posture, the suggestive element in the picture etc.

14. Where issue of obscenity relates to the script (viz-a-viz a photograph), issue has to be considered differently for the reason in the celebrated decision of the Supreme Court reported as AIR 1965 SC 881 *Ranjit D.Udeshi Vs. State of Maharashtra* the realities of popular permissiveness was reflected by the Constitution Bench of the Supreme Court. The Supreme Court spoke of "*new literary standards*" and noticed that the world had moved away from the times when even "*Mill On The Floss*" was considered immodest.

15. But where repetitive photographs without any backdrop content are published in a magazine and nearly 1/4th of the magazine consists of nothing but repetitive

photographs of semi-nude women, prominence being to display their breast, there being hardly any literary contents in the magazine, the matter loses any literary content and therefore the broad social outlook penned in *Ranjit Udeshi*'s case may not be available as a defence.

16. Webster third new international dictionary defines "*obscene*" as what is repulsive by reason of malignancy, hypocrisy, cynicism, irresponsibility, gross disregard of moral or ethical principles.

17. I would view the issue with reference to "*pornography*" for the reason where a writing or a picture leans towards pornography it would certainly be obscene for the reason pornography is the more aggravated form of obscenity.

18. Prima facie, pictures which are only intended to arouse sexual desire would be pornographic. Certainly, such pictures would offend and would be against public decency and morals, hence obscene. In *Queen Vs. Hicklin* 1868 LR 3 QB 360, the test of obscenity was defined as under:-

> ".....I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall ..... it is quite certain that it would suggest to the minds of

> the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

19. In the decision reported as AIR 1970 SC 1390 *Chandrakant Kalyandas Kakodkar Vs. State of Maharashtra & Ors.* it was inter alia emphasized as under:-

> "The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country ..... The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in Udeshi's case, if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect."

20. It is a recognized principle of law that the concept of obscenity is molded to a great extent by the social outlook of the people who are generally expected

to read the book or an article and hence, in relation to nude/semi-nude pictures of a woman it would depend on a particular posture and the background in which the woman is shown.

21. Prima facie, a look at the impugned pictures in the magazine would show that there is hardly anything aesthetic or artistic about them. Rather the pictures seem to have taken and published with the sole purpose of attracting readers who have a prurient mind.

22. I refrain from expressing any conclusive opinion for the reason this may prejudice the accused.

23. Issue which has to be decided by me is whether there is prima facie sufficient material to frame the charge against the petitioner. I find that there is sufficient material to frame the charge against the petitioner.

24. I do not find that the learned court below have not kept the relevant legal principles in mind. I do not find that the learned courts below have prima facie committed any illegality or irregularity.

25. The petition is dismissed.

26. LCR be returned.

November 5, 2007 PRADEEP NANDRAJOG
mm JUDGE